Supreme Court, U.S.
FILED
NOV 28 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD ROTHENBERG,

Petitioner,

v.

THE AMALGAMATED SUGAR COMPANY, LLC CORPORATION, LN PARTNERSHIP, NL INDUSTRIES, INC., ROBERT A. BICKS, NICHOLAS F. BRADY, MAURICE F. GRANVILLE, WILLIAM A. MARQUARD, JAMES F. MATHIS, THEODORE C. ROGERS, IAN M. ROSS, HERMAN J. SCHMIDT, ROBERT G. SCHWARTZ, DONALD V. SEIBERT, ELEANOR B. SHELDON and THOMAS P. STAFFORD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF RESPONDENT NL INDUSTRIES, INC. IN OPPOSITION

RICHARD L. BOND
Counsel of Record
JOHN G. RAINEY, JR.
DORSEY & WHITNEY
350 Park Avenue
New York, New York 10022
(212) 415-9200

Attorneys for Respondent
NL INDUSTRIES, INC.

Dated: November 25, 1987

1488

QUESTION PRESENTED

Has petitioner established grounds for this Court's review of the unanimous decision of the Second Circuit, which was based on unassailable factual findings by the District Court, that a shareholder who had notice of and chose not to intervene in litigation regarding the validity under state law of a corporate act is bound by the final judgment entered against his corporation and its directors, where the interests of the shareholders were vigorously and faithfully represented?

STATEMENT PURSUANT TO RULE 28.1

This brief in opposition to Richard Rothenberg's petition for a writ of certiorari is filed on behalf of NL Industries, Inc. ("NL"). Valhi, Inc. currently owns approximately 51% of the outstanding common stock of NL. A listing of NL's affiliates or subsidiaries, other than wholly owned subsidiaries, is set forth in the Appendix. Companies affiliated with Valhi, Inc. are identified in the Statement Pursuant To Rule 28.1 appearing in the Brief For The Amalgamated Sugar Respondents In Opposition.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT PURSUANT TO RULE 28.1	i
TABLE OF AUTHORITIES	iii
COUNTER-STATEMENT OF THE CASE	1
REASONS FOR DENYING THE PETITION	6
THE FACT-SPECIFIC HOLDING OF THE COURT OF APPEALS, METICULOUSLY SUPPORTED BY THE FACTUAL FINDINGS OF THE DISTRICT COURT, PRESENTS NO FEDERAL ISSUE APPROPRIATE FOR REVIEW BY THIS COURT	6
CONCLUSION	8

TABLE OF AUTHORITIES

Cases	Page
Amalgamated Sugar Co. v. NL Industries, Inc., 825 F.2d 634 (2d Cir. 1987)	*passim*
Amalgamated Sugar Co. v. NL Industries, Inc., 667 F. Supp. 87 (S.D.N.Y. 1987)	*passim*
Amalgamated Sugar Co. v. NL Industries, Inc., 644 F. Supp. 1229 (S.D.N.Y. 1986) ...	2

No. 87-697

In The

Supreme Court of the United States

October Term, 1987

Richard Rothenberg,

Petitioner,

v.

The Amalgamated Sugar Company, LLC Corporation, LN Partnership, NL Industries, Inc., Robert A. Bicks, Nicholas F. Brady, Maurice F. Granville, William A. Marquard, James F. Mathis, Theodore C. Rogers, Ian M. Ross, Herman J. Schmidt, Robert G. Schwartz, Donald V. Seibert, Eleanor B. Sheldon and Thomas P. Stafford,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Respondent NL Industries, Inc. respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the opinion and order of the United States Court of Appeals for the Second Circuit, reported at 825 F.2d 632. In an attempt to lend cogency to arguments previously made to, and unanimously rejected by, the Court of Appeals, petitioner distorts the record upon which the District Court and Court of Appeals rendered their fact-specific decisions.

COUNTER-STATEMENT OF THE CASE

The outcome of this case in the Court of Appeals was largely determined by the detailed findings of fact entered by the United States District Court for the Southern District of New York and affirmed by the Second Circuit. Respondent

NL Industries, Inc. ("NL") adopts the factual recitations of the courts below, reproduced in petitioner's appendix at B2-B6 (District Court) and C4-C9 (Court of Appeals).[1]

Although petitioner does not challenge the findings of fact as clearly erroneous, and did not do so in the Court of Appeals, petitioner resorts to name-calling and innuendo that run directly contrary to the established facts as found by the District Court and affirmed by the Court of Appeals.

The factual findings show conclusively that NL and its directors "developed every detail that was pertinent to the resolution of the matter presented" in the litigation over the validity of NL's Preferred Share Purchase Rights Plan (the "Rights Plan"). 667 F. Supp. at 89.

That litigation resulted in the final judgment entered August 14, 1986, declaring the Rights Plan invalid under New Jersey law. That judgment is not before the Court on the present petition. The instant petition seeks review of the affirmance of the District Court's order, dated March 23, 1987, enjoining relitigation by petitioner of the invalidity of the Rights Plan.

NL and its directors conducted the Rights Plan litigation in furtherance of the interests of NL's shareholders, one of whom was petitioner:

> NL, and its directors vigorously defended that plan. They vigorously defended the right of the board of directors

---

[1] Petitioner also reproduced the prior opinion of the District Court, dated August 5, 1986, in *Amalgamated Sugar Co. v. NL Industries, Inc.*, 644 F. Supp. 1229 (S.D.N.Y. 1986). In that opinion, the District Court declared NL's Preferred Share Purchase Rights Plan, commonly known as a "poison pill," invalid under New Jersey state law and enjoined its implementation. The opinion by the District Court in the Rights Plan litigation is an important part of the background of the present dispute, because the August 5 opinion was the precursor to the final judgment, entered August 14, 1986, that was given *res judicata* effect in the instant action by the courts below. But the issue resolved in the August 5, 1986 decision of the District Court—the invalidity of NL's Rights Plan—is not before this Court on the present petition.

> elected by the shareholders and charged with the governance of the corporation by the shareholders to adopt that specific plan in what they claimed was the interest of the shareholders.
>
> . . . .
>
> Every argument that could have been presented to justify the validation of the preferred share purchase rights plan was presented by the defendants in their case. Their activities were certainly directly in the interests of shareholders other than Amalgamated and its affiliates and were intended so to be.

667 F. Supp. at 95. The Court of Appeals also specifically recognized the vigor with which NL and its directors conducted the Rights Plan litigation. 825 F.2d at 637.

Contrary to the frequent unsupported assertions of petitioner, NL's directors did not cease to represent the interests of NL's shareholders other than Amalgamated immediately upon Amalgamated's acquisition of 51% of NL's common stock. The directors who approved the terms of the settlement with Amalgamated had no affiliation with Amalgamated whatsoever, but were the same thirteen directors who had conducted the Rights Plan litigation against Amalgamated so vigorously. *See* 667 F. Supp. at 90.

> Despite Amalgamated's acquiring a 51 percent interest in the company, NL's 13 member board of directors, all but one of whom were independent of NL management, remained intact and retained operational control of NL.

825 F.2d at 637.

The findings below refute petitioner's assertion that "NL's management capitulated" to Amalgamated in order to acquire benefits for themselves. First, the settlement agreement author-

izing NL's consent to the entry of judgment was negotiated by NL's directors, not NL's management. Only one of NL's directors had any affiliation with NL's management. "Although Amalgamated agreed to maintain established benefit plans for certain NL employees, the agreement did not provide any benefit to the independent NL directors and, in fact, required that nine of the directors resign their board positions." 825 F.2d at 637. Thus, the persons approving the settlement derived no personal benefit and demonstrably were not acting to preserve their jobs.

Second, the District Court and the Court of Appeals recognized specifically that NL's directors acted properly in settling the Rights Plan litigation. There was "every indication in the record that the settlement represented their informed judgment that the interests of NL and its shareholders would be served best by settlement." 825 F.2d at 640. The District Court Judge, who had personal knowledge of the Rights Plan litigation, found that it had been, and would continue to be, "expensive and exhaustive," and "would have diverted the attention of plaintiffs and defendants from the business of productively running NL." 667 F. Supp. at 92. Based on the District Court's findings of fact, the Court of Appeals held:

> In the wake of this extremely costly and arduous litigation, and faced with a substantial likelihood of ultimate defeat, the NL directors authorized NL to enter into settlement negotiations with Amalgamated, and on August 13, 1986, NL followed the advice of its highly qualified independent counsel and financial advisors and approved a settlement agreement. The effect of the agreement was to permit Amalgamated to nominate a majority of NL's board sooner than would otherwise have occurred, while providing important protections for NL's minority shareholders.

825 F.2d at 637.

The findings of the District Court, affirmed by the Court of Appeals, also contradict petitioner's unsupported assertion that NL's shareholders had no notice of developments in the Rights Plan litigation.

> I reach back to what was before me during the course of the earlier litigation to say that the shareholders were kept informed of developments with respect to the preferred share purchase rights plan and of developments in the course of the litigation.
>
> Mr. Rothenberg specifically knew of that litigation and knew of the developments in the course of that litigation.

667 F. Supp. at 95; *see* 825 F.2d at 637. Indeed, petitioner's attorney wrote directly to the District Court Judge during the course of the Rights Plan litigation in an effort to influence its outcome. 667 F. Supp. at 90. In addition, NL distributed an Information Statement to all its shareholders which disclosed the terms of the settlement and final judgment. [J.A. 277, 292]. The District Court and Court of Appeals both noted that petitioner never moved to intervene in the Rights Plan litigation, either before final judgment to press his arguments before the District Court, or after judgment in an effort to appeal the final judgment. 667 F. Supp. at 90; 825 F.2d at 637.

Finally, petitioner is wrong in his assertion that Amalgamated obtained the immediate right to name a majority of NL's directors and thus acquired control of the Rights Plan litigation before the entry of a final judgment. The record reflects that Amalgamated did not name a majority of NL's directors until August 25, 1987, eleven days after entry of judgment in the Rights Plan litigation. [J.A. 468-69]. Pursuant to the settlement agreement, the directors of NL who had no affiliation with Amalgamated remained in control of the Rights Plan litigation until a final judgment was entered. 825 F.2d at 638; 667 F. Supp. at 90, 92.

REASONS FOR DENYING THE PETITION

THE FACT-SPECIFIC HOLDING OF THE COURT OF APPEALS, METICULOUSLY SUPPORTED BY THE FACTUAL FINDINGS OF THE DISTRICT COURT, PRESENTS NO FEDERAL ISSUE APPROPRIATE FOR REVIEW BY THIS COURT.

This litigation is noteworthy only for the vigor with which NL's directors conducted the Rights Plan litigation in the interest of NL's shareholders, including petitioner, and the great care with which the District Court and the Court of Appeals documented the factual findings upon which the opinions below are grounded. Those courts concluded that petitioner's interests were represented fully and faithfully by NL and its directors, such that fundamental principles of *res judicata* preclude this shareholder from seeking a second determination of the precise issue resolved in the District Court against his corporation and its elected representatives.

There is nothing novel or noteworthy about the basic principles of law that resulted in the injunction precluding petitioner from relitigating the invalidity of NL's Rights Plan. The opinion of the Court of Appeals does not hint of a departure from established precedent or even a split of authority on the relevant legal issues. Simply put, this case is about *facts*—and once those facts were determined by the District Court, the legal principles applied to them were unremarkable.

It is apparent merely by reading petitioner's "Reasons for Granting the Writ" that the issues he seeks to raise are entirely factual in nature, and thus wholly inappropriate for review by this Court. It also is clear that petitioner attempts to manufacture an issue for this Court by ignoring or misstating the governing facts established by the decisions of the District Court and Court of Appeals. Petitioner's mischaracterizations are corrected in NL's Counter-Statement of the Case.

The fundamental and noncontroversial principles of law relied upon by the District Court and the Court of Appeals are

set forth clearly in the reported decisions of those courts and need not be repeated here. To the extent that amplification of their reasoning or a rebuttal of the few legal arguments raised by petitioner may be useful to this Court, NL adopts the analysis set forth in the Brief For The Amalgamated Sugar Respondents In Opposition.

It is appropriate for NL to respond briefly and separately to petitioner's fourth and fifth asserted "Reasons for Granting the Writ" [Petition at 23-25], because those arguments are simply an unfounded attack on the conduct of the Rights Plan litigation by NL's directors.

The District Court correctly found that NL's directors faithfully represented petitioner and NL's other shareholders throughout every phase of the Rights Plan litigation, and the Second Circuit unanimously determined that "there is every indication in the record that the settlement represented their informed judgment that the interests of NL and its shareholders would be served best by settlement." 825 F.2d at 640.

Similarly, the specific factual findings of the District Court, affirmed unanimously by the Court of Appeals, demonstrate that NL's directors were adverse to Amalgamated when they conducted the Rights Plan litigation and negotiated an arm's-length settlement with Amalgamated, and that the conduct of the Rights Plan litigation was entrusted until entry of final judgment to the continuing NL directors who had no affiliation with Amalgamated. 825 F.2d at 638; 667 F. Supp at 90, 92.

These meticulously documented facts, and not the imagined grievances upon which petitioner bases his arguments, must govern this dispute. Viewed in light of the facts of this case, no issue of federal law is presented that merits review by this Court.

CONCLUSION

Based on the foregoing reasons, as well as the reported decisions of the courts below and the reasons set forth in the Brief For The Amalgamated Sugar Respondents In Opposition, the petition for a writ of certiorari should be denied.

Dated: New York, New York
November 25, 1987

Respectfully submitted,

Richard L. Bond
Counsel of Record
John G. Rainey, Jr.

DORSEY & WHITNEY
350 Park Avenue
New York, New York 10022
(212) 415-9200

Attorneys for Respondent
NL Industries, Inc.

No. 87-697

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD ROTHENBERG,

Petitioner,

v.

THE AMALGAMATED SUGAR COMPANY, LLC CORPORATION, LN PARTNERSHIP, NL INDUSTRIES, INC., ROBERT A. BICKS, NICHOLAS F. BRADY, MAURICE F. GRANVILLE, WILLIAM A. MARQUARD, JAMES F. MATHIS, THEODORE C. ROGERS, IAN M. ROSS, HERMAN J. SCHMIDT, ROBERT G. SCHWARTZ, DONALD V. SEIBERT, ELEANOR B. SHELDON and THOMAS P. STAFFORD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX TO BRIEF OF RESPONDENT NL INDUSTRIES, INC. IN OPPOSITION

RICHARD L. BOND
Counsel of Record
JOHN G. RAINEY, JR.

DORSEY & WHITNEY
350 Park Avenue
New York, New York 10022
(212) 415-9200

Attorneys for Respondent
NL INDUSTRIES, INC.

Dated: November 25, 1987

APPENDIX

Abbey Chemicals
Barbados Oil Field Services Limited
Baroid Australia Pty. Limited
Baroid Caribbean Ltd.
Baroid Drilling Chemicals Products Ltd.
Baroid Trinidad Services, Ltd.
Baroid de Venezuela, S.A.
Baroid of Nigeria Limited
Benton Chemie GmbH
Canada Metal Company
CeBo, N.V.
Kronos Titan GmbH
NL Baroid Minerals, Inc.
NL Spencer Kellog, Inc.
NL-Teijin Co. Ltd.
Pacific Petroleum Products, Inc.
Perubar, S.A.
R-N Corporation
Siam American Mining Company
Societe Industrielle du Titane S.A.
Sperry-Sun Saudi Arabia Ltd.
Titanium Metals Corporation of America
Tre-Tech, Inc.